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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/082,884	02/26/2002	Vijay Vaidyanathan	1104-034	5658

74548 7590 05/19/2008

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ART UNIT	**PAPER NUMBER**
4115	
MAIL DATE	**DELIVERY MODE**
05/19/2008	PAPER

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte VIJAY VAIDYANATHAN, and
CHRISTOPHER ALLIN KITZE

Appeal 2007-2051
Application 10/082,884
Technology Center 3600

Decided: May 19, 2008

Before HUBERT C. LORIN, LINDA E. HORNER, and JOSEPH A. FISCHETTI, *Administrative Patent Judges*.

FISCHETTI, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellants seek our review under 35 U.S.C. § 134 of the Examiner's final rejection of claims 1-42. We have jurisdiction under 35 U.S.C. § 6(b) (2002).

SUMMARY OF DECISION

We AFFIRM-IN-PART and ENTER A NEW GROUND OF REJECTION UNDER 37 C.F.R. § 41.50(b).

THE INVENTION

Appellants claim a method and system for enabling electronic delivery of files in a digital marketplace whereby digital files are bought and sold and fees taken for the transaction are automatically distributed to a reseller as commission for the transaction. (Specification 1:11-14)

Claims 1 and 29, reproduced below, are representative of the subject matter on appeal.

> 1. A method for enabling electronic delivery of files in a digital marketplace, the method comprising the steps of:
>
> (a) maintaining a data repository for storing information relating to the files available in the digital marketplace, including business rules associated with each file that define electronic transfer of the files during commercial transactions;
>
> (b) in response to a first user requesting to resell a particular file and thereby becoming a reseller, using the data repository to dynamically generate a reseller uniform resource locator (RURL) that uniquely identifies the reseller and the file;

(c) providing the RURL to the reseller for posting on a website in order to make the file commercially available to others on the website; and

(d) in response to a second user clicking on a link to download the file, retrieving from the data repository the business rules associated with the file identified in the RURL to customize the download of the file to the second user and to automatically distribute payments to the reseller and owner of the file.

29. A system for enabling electronic delivery of files over a network comprising a plurality of client computers, comprising:

a digital marketplace including a server coupled to the network;

a data repository accessible by the server for storing information relating to the files available in the digital marketplace, wherein the information includes business rules associated with each file that define electronic transfer of the files during commercial transactions;

wherein in response to a first user contacting the server and requesting to resell a particular file and thereby becoming a reseller, the server:

uses the data repository to dynamically generate a reseller uniform resource locator (RURL) that uniquely identifies the reseller and the file, and

provides the RURL to the reseller for posting on a website in order to make the file commercially available to others on the website; and

> in response to a second user clicking on a link to download the file, the server retrieves from the data repository the business rules associated with the file identified in the RURL to customize the download of the file to the second user and automatically distributes payments to the reseller and owner of the file.

THE REJECTION

The Examiner relies upon the following as evidence of unpatentability:

Wolfe	US 2003/0023687 A1	Jan. 30, 2003

Gervais, "Electronic Rights Management and Digital Identifier Systems," *Journal of Electronic Publishing*, Vol. 4, Issue 3, pp. 1-25 (March 1999).

The following rejection is before us for review.

1. Claims 1-42 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Wolfe in view of Gervais.

ISSUE

The issue before us is whether Appellants have sustained their burden of showing that the Examiner erred in rejecting the claims on appeal as being unpatentable under 35 U.S.C. § 103(a) over Wolfe in view of Gervais. This issue turns, in part, on whether the combination of Wolfe in view of Gervais discloses steps (a) and (b) of claim 1.

FINDINGS OF FACT

We find the following facts by a preponderance of the evidence:

1. The Specification describes that "…business rules 88 control how the file 12 and payments are commercially distributed. In a preferred embodiment, the business rules 88 specify the pricing model 30 that has been associated with the file 12, and optionally the retail price 34, and reseller commission 32." (Specification 13:14-17)

2. The Specification describes a server 69 which functions

> "…to authenticate users of the marketplace 10, receive and store the files when published by the content owners 14, and perform file delivery. The server 69 also allows the content owners to manage distribution of their files 12, and allows users to perform searches for files 12 to download, as described below. If any fees are required, the server 69 facilitates all the payment processing, thereby providing a self-contained digital marketplace 10.

(Specification 11:4-10)

3. The Specification describes that the server node includes a

> …file authority 76 [that] is a data repository that stores metadata and business rules that are associated with each file to control now commercial transactions are conducted, including distribution of funds to all parties involved. The file authority 76, the query database 70, the location database 72, and the user database 74 may

> each communicate with each other.
>
> (Specification 11:16-21)

4. The Specification describes that a "fingerprint 86 uniquely identifies each file 12 by the content contained therein. Identifying the files 12 by the fingerprint 86 allows the same file 12 to be searched and/or compared based on the content of the file 12, rather than by the name of the file 12, which are inconsistent." (Specification 12:21-23 to 13:1)

5. Wolfe discloses a digital marketplace in that the network in Wolfe is directed to electronic commerce, e.g., sale of items on the Internet (Wolfe, ¶¶[0001],[0016]).

6. Wolfe is directed to crediting an internet Web site for linking a query to a merchant website resulting in purchase and awarding a commission to that Web site for the sale that was redirected to the merchant's web site (Wolfe, ¶[0002]).

7. Wolfe discloses at ¶ [0016] the method by which commissions are credited using an identity code given the credited party as part of the link to the merchant page is such that:

> …an affiliate program is a commission tool used by an online merchant to pay Web site operators for referring customers to the merchant Web site, and where the customer purchases a product or performs some other

> desired activity. In an affiliate program offered by a merchant, a Web site operator usually applies to the merchant, is approved (becoming an "affiliate" of the merchant), and is given an identity code to use in Uniform Resource Locator (URL) links placed on the Web site that point to the merchant's URL.

8. Wolfe discloses that "[d]atabase 18 contains a variety of information related to an affiliate. In one embodiment, the host system 10 is operated by an affiliate network and the database 18 includes information concerning tracking and crediting commissions to affiliate accounts." (Wolfe, ¶[0061])

9. Wolfe discloses an

> …affiliate Web site 10 includes a processor, such as a server 17 operating in response to a computer program stored in a storage medium accessible by the server. The server 17 may operate as a network server (often referred to as a Web server) to communicate with the consumer systems 2. The server 17 handles sending and receiving information to and from consumer systems 2 and can perform associated tasks.

(Wolfe, ¶[0059])

10. Wolfe discloses an identity code corresponding to

> [t]he affiliate Web site 10 may contain one or more links 5 to other Web sites. In one embodiment, one or more links 5 may be to a merchant Web site 20. In the embodiment of FIG. 1, link 5 may be a specialized

> "affiliate link," containing identity codes that identify the consumer system 2 to the merchant Web site 20 as a "referral" of the affiliate Web site 10. The link 5 may point to the main Web page of the merchant Web site 20 or, the link 5 may point to other pages within the merchant Web site 20.

(Wolfe ¶[0062])

11. Wolfe discloses that the server 17 interacts with the database 18 such that:

> …changes to database 18 can be made dynamically, in real time to instantaneously update information contained in the database 18. Thus, credit to an affiliate's account for a commission may be processed immediately by server 17 without human intervention. Of course, other embodiments may include the host system 10 being operated by a merchant and/or the database 18 being maintained by the merchant.

(Wolfe, ¶[0061])

12. It is our understanding that it is a well known part of the Internet to use an attribute, such as metadata and fingerprints, to identify files by content.

13. Nothing in Wolfe precludes the items sold on line from being electronic content. In fact, Wolfe discloses that books are offered for sale in the electronic market place (Wolfe, ¶[0040]). The system in Wolfe is particularly well adapted to deliver electronic versions of the such books because each item sold can have an individual product URL (Wolfe, ¶[0054]) which would allow the content file to be

readily identified in the product database 28 and downloaded to a customer via the merchant server 27.

PRINCIPLES OF LAW

Claim Interpretation

We begin with the language of the claims. The general rule is that terms in the claim are to be given their ordinary and accustomed meaning. *Johnson Worldwide Assocs. v. Zebco Corp.*, 175 F.3d 985, 989 (Fed. Cir. 1999). In the United States Patent and Trademark Office (USPTO), claims are construed giving their broadest reasonable interpretation.

> [T]he Board is required to use a different standard for construing claims than that used by district courts. We have held that it is error for the Board to "appl[y] the mode of claim interpretation that is used by courts in litigation, when interpreting the claims of issued patents in connection with determinations of infringement and validity." *In re Zletz, 893 F.2d 319, 321(Fed. Cir. 1989)*; accord *In re Morris, 127 F.3d 1048, 1054(Fed. Cir. 1997)* ("It would be inconsistent with the role assigned to the PTO in issuing a patent to require it to interpret claims in the same manner as judges who, post-issuance, operate under the assumption the patent is valid."). Instead, as we explained above, the PTO is obligated to give claims their broadest reasonable interpretation during examination.

In re Am. Acad. of Sci. Tech Ctr., 367 F.3d 1359, 1364 (Fed. Cir. 2004).

Obviousness

"Section 103 forbids issuance of a patent when 'the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.'" *KSR Int'l Co. v. Teleflex Inc.*, 127 S.Ct. 1727, 1734 (2007). The question of obviousness is resolved on the basis of underlying factual determinations including (1) the scope and content of the prior art, (2) any differences between the claimed subject matter and the prior art, (3) the level of skill in the art, and (4) where in evidence, so-called secondary considerations. *Graham v. John Deere Co.*, 383 U.S. 1, 17-18 (1966). *See also KSR*, 127 S.Ct. at 1734 ("While the sequence of these questions might be reordered in any particular case, the [*Graham*] factors continue to define the inquiry that controls.")

In *KSR*, the Supreme Court emphasized "the need for caution in granting a patent based on the combination of elements found in the prior art," *id.* at 1739, and discussed circumstances in which a patent might be determined to be obvious. In particular, the Supreme Court emphasized that "the principles laid down in *Graham* reaffirmed the 'functional approach' of *Hotchkiss*, 11 How. 248." *KSR,* 127 S.Ct. at 1739 (citing *Graham*, 383 U.S. at 12 (emphasis added)), and reaffirmed principles based on its precedent that "[t]he combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results." *Id.* The Court explained:

> When a work is available in one field of endeavor, design incentives and other market forces can prompt variations of it, either in the same field or a different one. If a person of ordinary skill can implement a predictable variation, § 103 likely bars its patentability. For the same reason, if a technique has been used to improve one device, and a person of ordinary skill in the art would recognize that it would improve similar devices in the same way, using the technique is obvious unless its actual application is beyond his or her skill.

Id. at 1740. The operative question in this "functional approach" is thus "whether the improvement is more than the predictable use of prior art elements according to their established functions." *Id.*

The Supreme Court stated that there are "[t]hree cases decided after *Graham* [that] illustrate the application of this doctrine." *Id.* at 1739. "In *United States v. Adams*, … [t]he Court recognized that when a patent claims a structure already known in the prior art that is altered by the mere substitution of one element for another known in the field, the combination must do more than yield a predictable result." *Id.* at 1739-40. "*Sakraida and Anderson's-Black Rock* are illustrative – a court must ask whether the improvement is more than the predictable use of prior art elements according to their established function." *Id.* at 1740.

The Supreme Court stated that "[f]ollowing these principles may be more difficult in other cases than it is here because the claimed subject matter may involve more than the simple substitution of one known element for another or the

mere application of a known technique to a piece of prior art ready for the improvement." *Id.* The Court explained:

> Often, it will be necessary for a court to look to interrelated teachings of multiple patents; the effects of demands known to the design community or present in the marketplace; and the background knowledge possessed by a person having ordinary skill in the art, all in order to determine whether there was an apparent reason to combine the known elements in the fashion claimed by the patent at issue.

Id. at 1740-41. The Court noted that "[t]o facilitate review, this analysis should be made explicit." *Id.* (citing *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006) ("[R]ejections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness")). However, "the analysis need not seek out precise teachings directed to the specific subject matter of the challenged claim, for a court can take account of the inferences and creative steps that a person of ordinary skill in the art would employ."

Novelty/Obviousness Nonfunctional Descriptive Material

When "non-functional descriptive material" is recorded or stored in a memory or other medium (i.e., substrate), it is treated as analogous to printed matter cases where what is printed on a substrate bears no functional relationship to the substrate and is given no patentable weight. *See In re Gulack*, 703 F.2d 1381, 1385 (Fed. Cir. 1983).

Patentable weight should be given to descriptive material where a new and unobvious functional relationship exists between the descriptive material and the substrate. *See In re Lowry*, 32 F.3d 1579, 1582-83 (Fed. Cir. 1994); *In re Ngai,* 367 F.3d 1336, 1338 (Fed. Cir. 2004).

ANALYSIS

The rejections are reversed as to claims 1-28 and affirmed as to claims 29-42.

Claims 1-28

Each of independent claims 1 and 15[1] is drawn to a method enabling electronic delivery of files in a digital marketplace and require, *inter alia*: (a) maintaining a data repository accessible by the server for storing information relating to the files available in the digital marketplace, wherein the information includes business rules associated with each file that define electronic transfer of the files during commercial transactions; and (b) using the data repository to dynamically generate a reseller uniform resource locator (RURL) that uniquely identifies the reseller and the file.

The Examiner indicates that Wolfe discloses limitation (a) *supra* at ¶¶18, 64

[1] Claim 15 is drawn to a computer-readable medium containing program instructions that are presented in terms that match the steps recited in method claim 1.

(Answer 3). However, a reading of Wolfe reveals no disclosure of maintaining a data repository for storing information relating to files available in the digital marketplace. While Wolfe is directed to selling products on the internet (FF 5), it does not disclose tying rules to the products sold, but rather only ties rules to how commissions are paid to referring web sites (FF 6). As such, Wolfe is not concerned with how the downstream purchase happens, just if it does and how the referring Web site gets paid. Thus, Wolfe does not disclose using rules to control how a product is sold.

Appellants' business rules associated with each file control how the electronic transfer of the files occurs during commercial transactions (FF 1-3). As such, these rules are functional in that they effect the distribution of and payment for content purchased. The affiliate database 18 in Wolfe is disclosed as containing information which controls the tracking and crediting of commissions to affiliate accounts (FF 8) and hence is similarly functional in nature. However, the rules in Wolfe do not control the electronic transfer of the files during commercial transactions as required by the claims. Since claims 1 and 15 are directed to the process by which files are delivered to would-be purchasers, the step of customizing the download of files using rules to control the delivery of a file to a purchaser must be found in the prior art in order to sustain the method claims rejection. We do not find such a step disclosed in either Wolfe or Gervais.

Second, independent claims 1 and 15 also require the data repository to dynamically generate a reseller uniform resource locator (RURL) that uniquely

identifies the reseller and the file. While Wolfe similarly discloses modifying a Uniform Resource Locator (URL) to link to the merchant store and post same on a web site as required by the claims 1 and 15 (Answer 3), it is the referring Web site and not the data repository in Wolfe which modifies the URL (FF 7). This distinction is important because in Wolfe, although the referring Web site operator 10 provides the links to the merchant web site (FF 10), it does not control the products sold by the merchant. In contrast, Appellants' server 69 maintains data repository rules in data base 32 which allows content owners to manage the distribution of their files according to their own terms (FF 2).

Gervais is relied on by the Examiner to show that automatically distributing payments to the reseller and a content file owner was known at the time of the invention. (Answer 4) We need not address the combination of Wolfe and Gervais relative to claims 1 and 15 under 35 U.S.C. § 103(a) because we find that Wolfe fails to disclose the limitations of these claims as proposed by the Examiner. To these ends, we note that a review of Gervais reveals no remedy of the deficiencies noted *supra* with respect to Wolfe.

We cannot therefore sustain the rejections of claims 1 and 15 under 35 U.S.C. § 103(a). Since claims 2-15 and 16-28 depend from claims 1 and 15 respectively, we cannot sustain the rejection of those claims either.

Claims 29-42

Appellants do not provide a substantive argument as to the separate patentability of claims 30, 31, 35-42 that depend from claim 29, which is the

respective sole independent claim among those claims. Therefore, regarding the claims whose rejection is affirmed, we address only claim 29 and separately argued claims 32-34. Claims 30, 31, 35-42 fall with claim 29.
See, 37 C.F.R. § 41.37(c)(1)(vii) (2007).

We begin our analysis of claim 29 by determining the scope of this claim relative to the function language used to describe the system elements in it.

Appellants argue:

> Claim 29 recites, in relevant part, essentially the same elements as claim 1. That is, claim 29 recites "a data repository accessible by the server for storing information relating to the files available in the digital marketplace..."; "a first user contacting the server and requesting to resell a particular file and thereby becoming a reseller..."; and "uses the data repository to dynamically generate a reseller uniform resource locator (RURL) that uniquely identifies the reseller and the file ...." These correspond to the elements addressed above.

(Appeal Br. 12, 13) Appellants thus seek for us to provide the system of claim 29 with the like claim scope afforded the process claims 1 and 15 discussed *supra*. We decline to do so.

As set forth below, the system elements of claim 29 are described using functional language without key words which would make these descriptions positive limitations, such as provided when 35 U.S.C. § 112, sixth paragraph language is used. *See In re Prater*, 415 F.2d 1393, 1406 (CCPA 1969). Thus, while we are required to give such functional language weight in our determination

of patentability, we do so to the extent that the prior art is only capable of functioning in the manner claimed. *See In re Schreiber*, 128 F.3d 1473, at 1478-1479 (Fed. Cir. 1995). As such, we interpret claim 29 to require the following three basic elements:

i. a digital marketplace

ii. a server coupled to the network;

iii. data repository accessible by the server.

We interpret the following as functional language in claim 29:

a′. (as relating to the data repository) *"for storing information relating to the files available in the digital marketplace, wherein the information includes business rules associated with each file that define electronic transfer of the files during commercial transactions;"*

b′. (as relating to the server) *"uses the data repository to dynamically generate a reseller uniform resource locator (RURL) that uniquely identifies the reseller and the file, and provides the RURL to the reseller for posting on a website in order to make the file commercially available to others on the website; and in response to a second user clicking on a link to download the file, the server retrieves from the data repository the business rules associated with the file identified in the RURL to customize the download of the file to the second user and automatically distributes payments to the reseller and owner of the file."*

We find that Wolfe discloses all the positively recited system elements of claim 29 identified *supra*, namely: i) a digital marketplace in that the network in

Wolfe is directed to electronic commerce, e.g., sale of items on the Internet (FF 5); ii) a server 17 included as part of an affiliate web site 10 which is coupled to the network as a Web server (FF 7); and iii) database or data repository 18 accessible by the server 17 which data repository contains information concerning business rules (FF 8).

Addressing the functional language set forth *supra* at (a′), we find that the system in Wolfe is capable of selling items in general, and that components i-iii listed above taken together with like components at the merchant web site 28, make the system in Wolfe also capable of selling digital content, such as, e.g., electronic books (FF 13).

We have also found that the database 18 in Wolfe includes rules which govern the crediting of commissions to affiliate accounts (FF 6, 12). As such, the database 18 in Wolfe functions in a manner similar to Appellants' data repository by storing rules which function to control other operations related to the sales transaction, e.g., directing commission flow to accounts. Since the database 18 in Wolfe is a functional database, in that it governs the tracking and crediting of commissions to affiliate accounts using rules contained therein, the database 18 is thus also capable of storing other rules which would control other sales related functions, such as how the product is to be sold.

Addressing the functional language set forth *supra* at (b′), we find that the affiliate Web site server 17 in Wolfe is disclosed as interacting with the database 18 to dynamically update that database (FF 11). The server 17 is further disclosed

as being part of the host Web site 10, which Web site 10 is disclosed as containing one or more links 5 to other Web sites (FF 9, 10). Wolfe further discloses that the "link 5 may be a specialized 'affiliate link,' containing identity codes that identify the consumer system 2 to the merchant Web site 20 as a 'referral' of the affiliate Web site 10." (FF 10) Thus, since the database 18 already executes the rules governing the crediting of commissions to affiliate accounts for transfer of an item purchased (FF 8) and is connected to the server 17 containing the links to merchant sites, the database 18 would similarly be capable of using like rules to control downloading of the content sought by a customer.

Appellants argue however that "…the URL displayed is that of the merchant, and is therefore not a RURL that uniquely identifies the reseller and the file, as required by claim 1." (Appeal Br. 11) We are not persuaded by this argument for two reasons. First, the argument presumes that the RURL must belong to a reseller. However, given that claim 29 is a system claim and recites no means for distinguishing who receives the modified URL, Appellants' alleged distinction based on the characteristic of the system user cannot stand. That is, the recitation of the first user becoming a reseller is step personal to the party involved, which does not involve the system devices. Second, the URL displayed at the merchant web site in Wolfe is a modified form of the affiliate address in that "affiliate links" contain identity codes, similar to the R of the RURL, that identify the affiliate Web site 10 to the merchant Web site 20 (FF 7).

Likewise, Appellants' argument that Wolfe does not disclose "reselling of files" (Appeal Br. 9) equally fails with respect to the system claim 29, because the system as claimed does not distinguish between a pre-owned and a new item.

Appellants argue that "…Gervais does not teach or suggest any method to 'automatically distribute payments to the reseller and owner of the file.'" (Appeal Br. 12) We are not persuaded by this argument because although the Examiner relies on Gervais to show automatic distribution of payments, we nevertheless find that this feature is already taught by Wolfe (FF 11). Wolfe discloses automatic, "without human intervention," crediting of an affiliate's account (FF 11) as required by claim 1. As such, Wolfe is capable of paying whatever accounts the rules require the database 18 to pay. We therefore consider Gervais cumulative.

Finally, Appellants separately argue that the features of claims 32-34 are not found in the combination of Wolfe and Gervais (Appeal Br. 13). Appellants argue that while Wolfe teaches an affiliate identity code, "[t]his teaching of Wolfe is not equivalent to providing each record with a file ID, a file name, a content owner ID, metafile information, a fingerprint, and the business rules" as required by claims 32 and 34. While Wolfe discloses using an identification code for identifying an affiliate, it does not specifically disclose each of the identification labels enumerated in claim 32. However, we consider many of the items recited in dependent claim 32 to be directed to variations of identifiers usable in a database, such as found in Wolfe at database 18 (FF 8). That is, the server 17 in Wolfe could

use the affiliate ID as the same identifier for the file ID, file name and owner ID depending on how the database was set up.

As to the metadata information and fingerprint, these are terms which identify the file by content (FF 4) and are well known in Internet applications (FF12). They are more importantly, mere variations of file identification, in this case, by content and thus are deemed to be a predictable variation of the affiliate identifier disclosed in Wolfe. "When a work is available in one field of endeavor, design incentives and other market forces can prompt variations of it, either in the same field or in a different one. If a person of ordinary skill in the art can implement a predictable variation, § 103 likely bars its patentability." *KSR* at 1740.

Finally, Appellants argue that the redistributable indicator required by claim 33 cannot be a link to an affiliate network as proposed by the Examiner (Appeal Br. 14). Appellants submit that redirecting is not the same as redistribution. (Appeal Br. 14) Again Appellants' argument is based on process limitations in this a system claim. We thus read that part of the rules in Wolfe governing the distribution of payments in database 18 as defining a redistributable attribute of the database 18.

We also affirm the rejections of dependent claims 30, 31, and 35-42 since Appellants have not challenged such with any reasonable specificity.

CONCLUSIONS OF LAW

We reverse the rejection of claims 1-28 under 35 U.S.C. § 103(a) based on the combination of Wolfe and Gervais.

We sustain the rejection of claims 29-42 under 35 U.S.C. § 103(a) based on the combination of Wolfe and Gervais.

DECISION

The decision of the Examiner to reject claims 1-28 is REVERSED.

The decision of the Examiner to reject claims 29-42 is AFFIRMED but, because our rationale is substantially different from that used by the Examiner, we denominate this as new grounds of rejection under 37 C.F.R. § 41.50(b).

This decision contains a new ground of rejection pursuant to 37 C.F.R. § 41.50(b) (2007). 37 C.F.R. § 41.50(b) provides "[a] new ground of rejection pursuant to this paragraph shall not be considered final for judicial review."

37 CFR § 41.50(b) also provides that the appellant, WITHIN TWO MONTHS FROM THE DATE OF THE DECISION, must exercise one of the following two options with respect to the new ground of rejection to avoid termination of the appeal as to the rejected claims:

> (1) Reopen prosecution. Submit an appropriate amendment of the claims so rejected or new evidence relating to the claims so rejected, or both, and have the matter reconsidered by the examiner, in which event the proceeding will be remanded to the examiner . . . .

> (2) Request rehearing. Request that the proceeding be reheard under § 41.52 by the Board upon the same record . . . .

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv) (2007).

AFFIRMED IN PART; 37 C.F.R. § 41.50(b)

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